78656-9

NO. 78656-9

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL M. MILES

Petitioner.

RESPONDENT STATE OF WASHINGTON'S RESPONSE TO *AMICUS CURIAE* BRIEF OF ACLU

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A. Response to Amicus Brief of ACLU

The following is a response to the amicus brief filed by the American Civil Liberties Union (ACLU).

B. Statement of the Facts

The State relies primarily on the facts as presented in earlier briefs. Several characterizations of the facts by ACLU require comment.

While all of the cancelled checks provided by Ms. Gillett contained the endorsement of Michael Miles or MM Miles and showed they were negotiated at Washington Mutual, none of the checks contained a specific account number that would have allowed the Securities Division to narrow the focus of their subpoena. CP 83-86

The ACLU statement that the bank (Washington Mutual) "delivered the requested records to the State, which conducted further investigation and ultimately charged Miles with securities fraud" is misleading. The subpoena required the bank's records to be delivered to the Securities Division. CP 81-82 The King County Prosecuting Attorney did not receive copies of these records until they were provided by the Securities Division when they referred the matter for criminal prosecution some sixteen months later. Declaration of Martin Cordell at 2, SuppCP

____[1] The Securities Division did not charge Miles with securities fraud. They do not have that authority. As directed by RCW 21.20.370, the Division conducted an investigation into whether Michael Miles "has violated, is violating, or is about to violate any provision of this chapter [the Securities Act] or any rule or order under this chapter." It was the King County Prosecuting Attorney, an independent agency, that charged Miles with the crime at issue in this case.

C. Argument

(This brief follows the organizational structure of ACLU's Amicus Brief.)

1) A Bank's Records Are Not Private Affairs Under Const. Art. I §7

ACLU argues that a bank's records are private affairs without acknowledging that they are not protected under the Fourth Amendment and without doing a *Gunwall*[2] analysis in support of a finding that Const. Art. 1 §7 provides broader protection. A *Gunwall* analysis demonstrates

[1] As explained at n. 4 of the State's Response Brief, this document is the subject of a State's Motion to Supplement the Record. A Court of Appeals Commissioner has forwarded this issue to the court for resolution. It was not clear to Respondent whether, if the Motion is granted, the document would be filed in Superior Court and designated as supplemental Clerk's Papers or should be referred to in some other manner. It is referred to herein as SuppCP ____.

[2] *State v. Gunwall,* 106 Wn.2d 54, 720 P.2d 808 (1986).

that Washington does not have a long history of protecting a bank's records.

a) ACLU does not acknowledge that the Fourth Amendment does not protect a bank's records and does not do a *Gunwall* analysis in support of a finding that Const. Art. I, §7 provides broader protection.

It is well settled that a customer does not have a reasonable expectation of privacy in a bank's records of transactions with the customer under the Fourth Amendment. *United States v. Miller,* 425 U.S. 435, 96 S.Ct. 1619, 48 L.Ed.2d 71 (1976). ACLU has not provided a *Gunwall* analysis to show that Washington law is more protective of a bank's records than the Fourth Amendment. Failure to engage in such an analysis in a timely manner precludes this court from analyzing this issue on independent state constitutional grounds. *State v. Mierz,* 127 Wn.2d 460, 901 P.2d 286 (1995).

b) ACLU does not carry its burden of showing that existing state law demonstrates a long history of extending strong protection to a bank's records

Even if ACLU's citation to Washington case law was interpreted to be an effort to analyze pre-existing law in Washington - the fourth *Gunwall* factor, 106 Wn.2d at 61-62, its analysis fails. It is well established that because a substantial body of independent state

jurisprudence has established that the first, second, third, fifth and sixth criteria favor independent analysis under Const. Art. I §7, courts generally focus their inquiry on the historical question of whether preexisting state law supports greater protection than the United States Constitution in a particular context. *State v. Young,* 135 Wn.2d 498, 509, 957 P.2d 681 (1998).

To support its claim that a bank's records are private affairs entitled to broader protection under Const. Art I, §7 than under the U.S. Constitution, ACLU cites a case holding Const. Art. I §7 provided broader protection for telephone records (*State v. Gunwall,* 106 Wn.2d 54, 720 P.2d 808 (1986)). ACLU also cites dicta in cases dealing with drivers' license records and electrical consumption information. ACLU cites no case holding a broader constitutional protection to a bank's records under Const. Art. I, §7 than under the U.S. Constitution.

Compare that paucity of court decisions supporting ACLU's position with the numerous Washington court decisions holding to the contrary.

The first of these cases, *State v. McCray,* 15 Wn.App. 810, 555 P.2d 1376 (1976), at first glance seems to be a case the ACLU should have

cited. The *McCray* court relied on the lower court decision in *United States v. Miller,* 500 F.2d 751 (5th Cir. 1974) and a California Supreme Court opinion, *Burrows v. Superior Court of San Bernardino County,* 13 Cal.3d 238, 118 Cal.Rptr. 166, 529 P.2d 590 (1975), in holding that a person's bank account is protected against unwarranted searches and seizures by our federal and state constitutions. *McCray,* 15 Wash. App. at 814.

The U.S. Supreme Court's opinion in *United States v. Miller,* 425 U.S. 435, 96 S.Ct. 1619, 48 L.Ed.2d 71 (1976), then reversed the lower court opinion on which the *McCray* court's opinion relied and cast into doubt the *McCray* court's opinion that a bank's records were protected by the federal and state constitution.

In *Peters v. Sjoholm,* 25 Wn.App. 39, 604 P.2d 527 (1979), *aff'd, Peters v. Sjoholm,* 95 Wn.2d 871, 631 P.2d 937 (1981), cert. denied, 455 U.S. 914 (1982), Division II noted that the US Supreme Court's *Miller* opinion undercut the *McCray* court holding. The *Peters* court stated that:

> In view of the reasoning of the United States Supreme Court, the court's statement in *McCray*, that a person's bank account is protected against unwarranted searches and seizures, is of doubtful validity insofar as those protections are guaranteed by the federal constitution , , , [T]he *McCray* court did not expressly state or imply that it was imposing a higher standard than was guaranteed by the fourth

> amendment to the United States Constitution. Neither do we impute any greater protection or significance to article 1, §7 of the Washington State Constitution than we are obliged to provide under the fourth amendment to the United States Constitution. (emphasis added)

Peters v. Sjoholm, 25 Wn.App. at 43.[3]

The *McCray* court, even with its ultimately overruled conclusion that a bank's records are protected by the Fourth Amendment, still did not find this privacy right to be an absolute right. First, the *McCray* court distinguished the facts in the two cases on which it relied (*Miller,* 500 F.2d 751, and *Burrows,* 13 Cal.3d 238) because in both those cases information from the bank accounts was used to link the defendant with other crimes. The court noted that in neither case, as in *McCray* - an "NSF" check case - was a check drawn on the bank account in question used as the instrument by which the crime itself was committed. The *McCray* court concluded that *"Miller* and *Burrows* are thus distinguished from the case before us for decision." *McCray,* 15 Wn.App. at 814. The facts in the Miles case, where the Securities Division subpoena sought and obtained records on the very account - the instrumentality - through which Miles negotiated the proceeds of his fraud - are closer to *McCray* than to *Miller* or *Burrows.*

[3] In *Peters v. Sjoholm,* 95 Wn.2d 871, the Washington Supreme Court affirmed the Court of Appeals decision although on different grounds. The Supreme Court declined the opportunity to rule on the constitutional question of whether a bank's records were protected under either the federal or Washington constitution.

Second, and more important, the *McCray* court observed that:

> One who draws or issues a bad check knows full well that in the ordinary course of banking practice, when such a check is presented for payment to the bank on which it is drawn, it will almost certainly be dishonored by nonpayment and returned to the payee or holder of the check. Such person must also know that when the bank returns the check, the reason for the check being dishonored will customarily appear either on the face of the check, or on a slip attached to it, for all who handle the check to see. [footnote omitted]
>
> It seems clear to us that a person who writes or passes a bad check drawn on his or her bank account cannot have any justifiable expectation that the status of the account at that time will remain private. Quite aside from any legal consequences, the practical effect of putting such a check into the stream of commerce is to virtually insure that the state of the account will not remain private.

State v. McCray at 816.

The *McCray* court reached this conclusion notwithstanding the fact that, unlike the Securities Division's use of an administrative subpoena, the police in *McCray* had no warrant or subpoena or other claim of "lawful authority." The police just called the bank and obtained the information. It was not a constitutional violation because the defendant had no expectation of privacy in his bank records under the circumstances.

This holding by *McCray* has been cited with approval by several other courts. In *Peters v. Sjoholm,* 95 Wn.2d at 874, the court cited with

approval the holding of *McCray* that whatever privacy interest may exist in a bank's records, that privacy interest is greatly diminished when the person puts information about that account into the stream of commerce.

In *State v. Duncan,* 81 Wn.App. 70, 74, 912 P.2d 1090 (1996) the court also cited the *McCray* holding (no right to privacy to information about a bank account when a person drew checks on the account unlawfully and issued worthless checks) with approval. The court in *State v. Farmer,* 80 Wn.App. 795, 801, 911 P.2d 1030 (1996) similarly cited *McCray* with approval in holding that "assuming, arguendo, a customer has a legitimate expectation of privacy in a transaction with a business, that expectation ceases to exist once that customer discloses evidence of the transaction to a third party."

This holding of *McCray,* (that whatever privacy interest may exist in transactions with a bank, it is greatly diminished when the defendant discloses evidence of that transaction to a third party) reaffirmed repeatedly by both the Washington Supreme Court and the Courts of Appeal, is quite significant when the facts of the instant case are examined.

Julie Gillett gave Miles three checks. He endorsed each of these checks and negotiated them through Washington Mutual.[4] CP 83-86 His endorsement and the stamps and imprints of Washington Mutual involved in negotiating the checks are contained on the back of the checks. Miles knew that Ms. Gillett's cancelled checks would be forwarded to her bank by Washington Mutual and returned by her bank to Ms. Gillett. He knew his endorsement and identification of the bank through which he negotiated her checks would be known to her by virtue of his putting those endorsed checks into commerce. Just like McCray, Miles cannot have a justifiable expectation of privacy in the records related to this transaction when he shared information about those records to a third party - the victim Julie Gillett.

ACLU does not carry the burden under the *Gunwall* fourth factor of showing that existing *case law* demonstrates a long history of extending strong protection to a bank's records. With one narrow exception found on p. 18 of Amicus Brief, ACLU makes no effort to suggest that *statutory law* demonstrates strong protection either.

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[4] Miles converted one of the checks Gillett gave him to a cashier's check. He then endorsed and deposited that check into his Washington Mutual account. CP 41, Certification for Determination of Probable Cause at 7, SuppCP ____, CP 83

The one exception is the provisions of the bank examination statute, RCW 30.04.075.

The statute allowing bank examinations and allowing the Department to give information to law enforcement had been on the books since 1917. Laws 1994 c 92 § 9; Laws 1989 c 180 § 1; Laws 1985 c 305 § 3; Laws 1983 c 157 § 3; Laws 1982 c 196 § 6; Laws 1955 c 33 §30.04.060; Laws 1937 c 48 § 1; Laws 1919 c 209 § 5; Laws 1917 c 80 § 7; RRS § 3214. The provision requiring notice to bank customers was not added until 1977. 1977 ex-s c. 245. This demonstrates a long standing tradition of not assigning a high privacy interest to customers of bank accounts.

Second, even this protection is only given the account holder in a situation where the account holder is not the target of the investigation. In contrast the State has cited 70 specific statutes which provide regulatory agencies with the authority to subpoena records, including bank records. NONE of those statutes provides for prior judicial review of such subpoenas or notice to the account holder. The legislature is certainly aware of the issue and knows how to require notice, and yet they have not done so in any of the seventy statutes involving subpoena authority.

Finally, and even more devastating to ACLU's argument, is the silence of our state legislature in the face of the U.S. Supreme Court's decision in *United States v. Miller*, holding there is no reasonable expectation of privacy in a bank's records under the Fourth Amendment. The U.S. Congress almost immediately said "If there's no constitutional privacy in bank records we'll create a statutory privacy interest." This law, the Federal Right to Financial Privacy Act, 12 U.S.C. §§3401-3422, balances the privacy interests of the citizens with the government's legitimate investigative needs in protecting the public interest. Several states did the same thing.

What did the Washington legislature do? Did they say, like the congress and so many state legislatures, that there should be a privacy interest in bank records and we'll establish one by statute? Did they in any way suggest a disagreement with *U.S. v. Miller*'s holding? They did not.

In the face of these facts and this history it strains credulity to claim that prior law has established a privacy interest in a bank's records.

Rather than using the required six factor analysis of *Gunwall*, ACLU instead relies on an almost visceral sense that bank records are constitutionally protected. This kind of analysis was anticipated and

soundly rejected in *Gunwall,* where the court explained why they established the six factor analysis:

> Thus, the foregoing six criteria are aimed at . . . helping to insure that if this court does use independent state constitutional grounds in a given situation, it will consider these criteria to the end that our decision will be made for well founded legal reasons and not by merely substituting our notion of justice for that of duly elected legislative bodies or the United States Supreme Court. As Professor George R. Nock colorfully expressed it in a privacy context:
>
> "The principles that lie at the core of our protection from wrongful privacy invasions did not spring forth from the brow of an Olympian jurist agonizingly meditating upon constitutional mysteries."
>
> Nor should they. Recourse to our state constitution as an independent source for recognizing and protecting the individual rights of our citizens must spring not from pure intuition, but from a process that is at once articulable, reasonable and reasoned.

Gunwall, 106 Wn.2d at 62-63.

2) An Administrative Subpoena is Authority of Law

Administrative Subpoena law has been extensively briefed. While ACLU need not address every issue before this court to be able to file an amicus brief, its failure to address the privacy of a bank's records in the context of administrative subpoena law, cited by all parties and the trial judge, undercuts its claim that the records herein obtained were obtained illegally.

ACLU contends that the *Gunwall* court's own words cannot be taken at face value. ACLU contends that the search warrants and subpoenas referred to in *Gunwall* as authority of law must be limited to warrants and subpoenas issued according to court rules.

There are two fundamental problems with this argument. First ACLU's argument flies in the face of the very words used by the *Gunwall* court. The phrase in question is:

> Generally speaking the "authority of law" required by Const. art. 1, 7 in order to obtain records includes authority granted by a valid (i.e., constitutional) statute, the common law or a rule of this court.

Gunwall, 106 Wn.2d at 68-69. The *Gunwall* court included three sources of lawful authority: statute; the common law; or a court rule. The very words of the court belie ACLU's position that only warrants and subpoenas issued under a court rule are covered.

Second, at p. 6 of its Amicus Brief, ACLU's lists the types of subpoenas it believes are covered by *Gunwall's* reference to subpoena - those authorized by court rule. Only these subpoenas can provide authority of law. ACLU says this list excludes administrative subpoenas authorized by statute. This list also excludes another type of subpoena that is authorized by statute, not court rule - a subpoena power that existed

thirty-five years before the constitution itself was written and has continued in existence ever since - the grand jury subpoena.[5] Even more devastating to ACLU's position, a grand jury subpoena requires neither prior judicial approval or notice to the subject. In the controlling case on administrative subpoena law, Justice Jackson likened an administrative subpoena to a grand jury subpoena.

> It is more analogous to the Grand Jury which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not.

United States v. Morton Salt Co., 338 U.S. 632, 643, 70 S.Ct. 357, 94 L.Ed. 401 (1950)

3) Requiring Notice To The Subject Of An Investigation As A Matter Of Constitutional Law Would Undermine Investigative Ability

ACLU states at p. 9 of its Amicus Brief that the Securities Division, as a way of avoiding notice, could have gone directly to court asking for issuance of either a subpoena or warrant. Neither option was available to the Division. ACLU cites no authority, and there is no authority, permitting a court to issue a subpoena at the request of or on behalf of the Securities Division or any other regulatory agency.

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[5] Laws 1854, p. 111 § 57, Laws 1873, p. 222, § 176, Code 1881, § 992, RRS § 2040.

Nor could the Securities Division have requested a warrant. CrR 2.3(a) governing search warrants permits the issuance of a warrant only upon request of a peace officer or the prosecuting attorney. The Securities Division is neither.

ACLU's discussion of alternatives to the procedure followed by the Securities Division (issuance of a subpoena under the statutory investigative authority of RCW 21.20.380) underscores ACLU misapprehension of the Securities Division's statutory duties. ACLU's argument suggests the Securities Division should have used the tools available to law enforcement in criminal investigations. But the Securities Division was conducting a civil administrative investigation (which admittedly had the potential to lead to criminal charges). If the legislature wanted to, it could give search warrant or inquiry judge powers to the Securities Division and other regulatory agencies. Instead, the legislature has recognized the distinct differences between administrative agencies and traditional law enforcement, as indicated by the great body of administrative agency investigation law represented by RCW 21.20.380 and the other sixty-nine statutes cited by the State, CP 58-67, where the legislature has given investigative authority to administrative agencies, boards and commissions.

Finally on the issue of notice ACLU discounts the impact of mandating notice on administrative investigations by pointing to the notice requirements of the federal Right to Financial Privacy Act, 12 U.S.C. §§ 3401-4322 and to similar statutes enacted in several states. But a statute, weighing the benefits and hazards associated with notice, requiring notice in some situations but allowing notice to be delayed or dispensed with in other situations is not what ACLU requests from this court. ACLU requests a finding that the constitution demands notice. It is the blanket rule that ACLU and Miles seek from this court, that notice is always required as a matter of constitutional law, that would handcuff administrative agencies in pursuit of their statutory obligations.

4) Pervasive Regulation Of An Industry Is An Exception To Const. Art. I §7

ACLU's first argument is that in Washington participation in a pervasively regulated industry is not a recognized exception to Const. Art. I §7.

ACLU concedes that Washington courts have on numerous occasions recognized the pervasively regulated industry exception, but not in the context of an independent state constitutional grounds under Const. Art. I §7. ACLU cites no authority for the proposition that holdings of the

Supreme Court before the development of a separate state constitutional jurisprudence are invalid unless they are subsequently endorsed under an independent state constitutional grounds analysis and yet that seems to be the entire response of the ACLU to the body of law represented by the cases it cites at p. 11 of Amicus Brief.

Two cases cited by ACLU undermine its position. The decisions occurred well after the growth of independent state constitutional grounds analysis. ACLU seeks to distinguish *Alvarado v. WPPSS*, 111 Wn.2d 424, 759 P.2d 427 (1988) because that court held that the state constitution was irrelevant to its decision. Amicus Brief at pp. 11-12. Whatever the merits of that decision, it certainly does not undermine existing Washington case law recognizing a pervasively regulated industry exception.

The other case cited by ACLU is *Murphy v. State,* 115 Wn.App. 297, 62 P.3d 533 (2003). The ACLU states that one could interpret *Murphy* as finding a combination of pervasive regulation, authority of law, and limited exception of privacy in pharmacy records. ACLU attempts to distinguish *Murphy's* apparent endorsement of the pervasive regulation exception by contending that *Murphy* "erroneously held that the

protections of the Fourth Amendment and Article 1, Section 7 were coterminous." Amicus Brief at p. 12.

Murphy contained no such error. *Murphy* acknowledged stronger protections had been accorded some privacy interests under Const. Art. I §7 but stated

> But just because a state constitutional provision has been subject to independent interpretation and found to be more protective in a particular context, it does not follow that greater protection is provided in all contexts.

Murphy v. State at 311.

Washington law has long recognized that "when an entrepreneur embarks upon such a [pervasively regulated] business he has voluntarily chosen to subject himself to a full arsenal of governmental regulation." *State v. Mach,* 23 Wn. App. 113, 114, 594 P.2d 1361 (1979).

ACLU has not done a *Gunwall* analysis to show that Washington law is more protective than the Fourth Amendment. Failure to engage in such an analysis in a timely manner precludes independent state constitutional grounds analysis. *State v. Mierz,* 127 Wn.2d 460, 901 P.2d 286 (1995). Their argument that the "pervasively regulated industry" exception does not apply to Const. Art. I §7 protections should be rejected as unsupportetd.

Next ACLU argues that *searches* of pervasively regulated industries must be strictly limited to the business sphere. The State has previously argued that whatever the law is regarding *searches* of pervasively regulated industries, the law regarding *subpoenas* in pervasively regulated industries is less strict. State's Response Brief, pp. 26-28. ACLU does not address this argument.

There is a deeper flaw in ACLU's analysis. ACLU contends that, at best, under the pervasively regulated industry exception the Securities Division was limited to examining Miles business records, not "unrelated personal records." Amicus Brief at 15.

There are three responses.

First it was not the Securities Division overreaching that caused "unrelated personal records", if such they be, to be reached by the subpoena. It was Miles' act of conducting his securities business through his personal bank account. It was Miles, not the Securities Division, who co-mingled his personal records, if such they be, with his business records.

ACLU's proposal for how the Securities Division investigation should have proceeded to protect Miles' personal records from inspection

is naive at best. ACLU suggests the subpoena should first have requested only deposits made out to MM Miles.

Even if the bank was capable of complying with such a limited request[6], such a subpoena would miss a number of the investor checks received by Miles and negotiated through his Washington Mutual account. As previously stated, one of the checks ultimately received by Miles relating to victim Julie Gillett's investment, was payable to Michael Miles. As the Certification for Determination of Probable Cause, SuppCP ____, numerous other investor checks were payable to a person or entity other than MM Miles.[7] Even ACLU would concede that such investor checks

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[6] Subpoena compliance departments of banks are so overworked they can barely keep up with requests for records on specific accounts, let alone specific documents within such accounts based on from whom the items comes or to whom it is payable. They will not perform analysis of their records; they simply give the records for a particular time frame.

[7] The Superior Court Clerk's Office includes the Certification for Determination of Probable cause with the Information into one document called "Information". Since the State will be referring to the Certification attached to that document we will refer to it as Certification for Determination of Probable Cause. All of the following references are to page numbers within Certification for Determination of Probable Cause, SuppCP ____.

Victim Sandra Farwell only check to Miles was payable to Michael Miles. p. 3 Four of victim Susan Campbell's investment checks to Miles were payable to Michael Miles. One was payable to MM Miles. Six were payable to M. Miles. One was payable to M. Miles Co. pp. 4-5. Two of victim Susan Berndt's checks were payable to M. Miles. Three were payable to MM Miles. pp. 9-10. One of victim Sue C Bowman's checks was payable to Michael Miles. The other was payable to MM Miles. This check was converted to a cashier's check which was then converted into a cashier's check and cash. p. 11. Victim Michelle Bahr's check was payable to MM Miles. p. 13. Victim Cary Schroyer's two checks were payable to MM Miles. p. 13. Thus of the twenty checks from investors negotiated by Miles through his Washington Mutual account, only six were payable to MM Miles.

were part of Miles' business activity and yet they would have been missed by ACLU's recommended narrow subpoena.

Second, and most important, Miles violation of securities law was revealed not just by his *receipt* of investor funds but also by his *use* of such funds. Miles cannot shield his wrongful use of investor funds from scrutiny by co-mingling his personal expenditures with his business expenditures. Unfortunately for ACLU's position (and unfortunately for the victims) virtually all of the victims' investment money was in fact on personal expenditures supporting Miles' lavish life style.[8]

ACLU claims that the problems with the Securities Division subpoena illustrate why prior review by a neutral magistrate is crucial to protecting an account holder. ACLU contends that a neutral magistrate would have discovered the errors in the Securities Division subpoena and have appropriately narrowed the scope to ensure that only relevant business records were obtained. Amicus Brief at p. 16.

Miles co-mingling of his personal and business records made a more narrowly crafted subpoena impossible, whether done by the Securities Division or a neutral magistrate. Such a review would have

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[8] See Certification for Determination of Probable Cause, SuppCP ___ at pp. 2, 5-6, 8, 10-15.

provided no additional protection to Miles beyond the good faith actions of the Securities Division and the long held recognition that our public officials will properly and legally perform their duties. *Rosso v. State Personnel Board of Washington,* 68 Wn.2d 16, 20, 411 P.2d 138 (1966).

Finally ACLU contends that even investigations of pervasively regulated industries require judicial oversight beyond the judicial supervision already contained in the securities act. ACLU bemoans the fact that the Securities Division could have initiated this investigation only to find that the complaint was false and that Miles was in fact not a securities trader. ACLU claims that Miles would have had no recourse for this invasion of his privacy.

ACLU has already conceded that the Securities Division had probable cause for a search warrant. Amicus Brief at p. 9. Setting aside for the moment the issue of how, procedurally, the Securities Division could have obtained such a warrant, what would have been the result? Miles might have found out about the investigation and obtaining of his bank records from the bank, or by periodically reading public search warrant files. Unfortunately for Miles, the rest of the public would also receive notice, because the Division's affidavit in support of the warrant

would be a public document. Requiring the Division to spell out its investigative allegations in a public document hardly seems to provide enhanced protection to Miles' privacy interests.

Second, it is the duty of the Securities Division to conduct such investigations even if the complaint ultimately turns out to be false. As Justice Jackson said in *United States v. Morton Salt Co.,* 338 U.S. 632, 642-43, 70 S.Ct. 357, 364, 94 L.Ed. 401 (1950):

> [An administrative agency charged with seeing that the laws are enforced] has a power of inquisition, if one chooses to call it that, which is not derived from the judicial function. It . . . can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not.

D. Conclusion

At p. 18 of its Amicus Brief, we get to the ACLU's real concern. ACLU is concerned that affirming Judge Armstrong's Order denying the defendant's motion to dismiss:

> would allow the Division to rummage through banking records of just about any Washingtonian.

ACLU points to no evidence in this case that was obtained improperly. ACLU advances no evidence that the Securities Division or any of the other 69 regulatory agencies with similar subpoena authority have abused their subpoena power regularly, or even once.

The Securities Division received a complaint that the defendant had violated the Securities Act. The records provided the Division by the victim on their face supported this allegation and pointed to records in an account or accounts at Washington Mutual as the source of information about whether or not a violation had in fact occurred. The records obtained by the Securities Division under the subpoena issued to Washington Mutual did not go beyond the reach of the Securities Division's authority or the authority of the statute giving them subpoena authority. It is no wonder that ACLU at the end of its brief relies not on the facts of this case to support its argument but the imaginary threat that the Securities Division will now look at everybody's bank records.

DATED this 26th day of October, 2006.

Respectfully submitted,

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